Supreme Court, U.S.
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No. 99-901

IN THE

Supreme Court of the United States

BRENTWOOD ACADEMY,
Petitioner,

v.

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION and RONNIE CARTER, Executive Director and Individually,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY TO BRIEF OF RESPONDENTS

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I. Areas No Longer Analytically Contested or Matters Influenced By Subsequent Decisions of This Court

At the outset, it is appropriate for petitioner to highlight some points that, as a result of respondents' submission, are no longer in contention, or, as a result of subsequent decisions of this Court, are viewed in a brighter light.

1. The court of appeals found not "controlling" this Court's "comments" in footnote 13 in *NCAA v. Tarkanian*, 488 U.S. 179, 193 n.13 (1988), that the regulatory conduct of high school athletic associations largely composed of and controlled by public institutions from within a single state would constitute state action. 180 F.3d at 766. The rationale of the court of appeals was that "all nine justices agreed that even if an athletic association is a state actor when dealing with a public school, it 'was not acting under color of state law in its relationships with private universities.'" *Id.* That analysis "misapplies the reasoning in *Tarkanian*." *Communities for Equity v. Michigan High Sch. Athletic Ass'n*, 80 F. Supp.2d 729, 742 (W.D. Mich. 2000). See Brief of Petitioner at 36-39. In their brief, respondents no longer defend the court of appeals' analysis of footnote 13, which analysis should be viewed as discredited.

2. Respondents do not contest the point made by Judge Merritt in his dissent to the denial of the petition for rehearing *en banc,* 190 F.3d at 707, that the decision of the court of appeals is out of sync with every other appellate court to decide the state action status of the regulatory conduct of high school athletic associations. See Brief for Petitioner at 16-19. In its *amicus curiae* brief in support of

petitioner, the United States reinforces this point: "With the exception of the court below, the courts of appeals have uniformly held that athletic associations composed primarily of public schools are state actors." Brief for the United States at 14. Neither respondents nor their *amici* cite appellate authority from outside the Sixth Circuit supporting the state-action holding of the court of appeals in this case regarding the state-action status of the regulatory conduct of a high athletic association.

This makes rather hollow the claim by respondents and their association *amici* that reversal of the court of appeals herein would open the "floodgates of potential litigation arising out of extracurricular activities." Brief of Respondents at 33. *See also* Brief of Interscholastic Associations at 7. The regulatory conduct of these associations has been considered state action for over thirty years, plenty of time for evidence to accrue. Respondents and their *amici* can do no more than make unsubstantiated pie-in-the-sky, Chicken-Little-type statements about the fear of federal court litigation. Such non-meritorious litigation has not proliferated. The reason is that the courts have adopted substantive doctrines under equal protection and due process that, properly, defer to the rational regulatory judgments of these associations. *See, e.g., Walsh v. Louisiana High Sch. Athletic Ass'n*, 616 F.2d 152 (5th Cir. 1980).[1] This discourages inappropriate or unwarranted litigation.[2] For further elaboration of this point, see Brief of

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[1] *Cf. Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998) (requiring showing of actual notice and deliberate indifference before school district can be held liable for damages under Title IX).

[2] Such deference would be inappropriate in a first amendment challenge such as the one underlying the litigation herein. Petitioner has been able to identify only one similar first-amendment-based lawsuit, *Holy Cross College, Inc. v. Louisiana High Sch. Athletic Ass'n*, 632 F.2d 1287 (5th

Chester E. Finn, Jr. and Daniel Casse, CP 6-8-E [references to the Petition for Writ of Certiorari and its appendices are cited herein with a CP prefix].

3. For the court of appeals, the formal revocation by the State Board of Education (SBE) of its "designation of TSSAA to regulate and organize interscholastic athletics" was "fundamental" in distinguishing earlier circuit precedent. 180 F.3d at 765-66. The formal revocation of TSSAA designation by SBE was determinative for the court of appeals, even though the district court had found that "[n]othing about the function of TSSAA has changed" and that there was no change in the "actual conduct of the TSSAA." CP 26-27-B. The court of appeals did not consider the functional realities or the ongoing effect of past state involvement.[3]

In his dissent, Judge Merritt criticized the failure of the court of appeals to engage in a "'functional' analysis of

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Cir. 1980), even though the regulatory conduct of high school athletic associations is considered state action in the third, fourth, fifth, seventh, eighth, ninth, tenth, and eleventh circuits, as well as in numerous individual states. See Brief for Petitioner at 17-19 & nn. 8-12; Brief for the United States at 14 & n.2.

[3] *Cf. Santa Fe Indep. Sch. Dist. v. Doe*, 2000 U.S. LEXIS 4154, at *33-34 (noting importance of practical reality of ongoing effect of past policy, despite nominal change in policy). In *Santa Fe*, this Court observed that no new election was conducted under the new policy regarding student-led prayer; the results of the election under the ostensibly superseded policy remained in effect. The same occurred when TSSAA was no longer formally designated by SBE to regulate interscholastic athletics as SBE's agent. When that formal designation was changed to recognition, nothing of substance changed. The TSSAA did not engage in any substantive review of its rules, policies or procedures, including the Recruiting Rule under challenge. The same previously SBE-approved rules remained in effect without review, even after the formal designation ostensibly terminated. CP 26-27-B.

the private ... agency in question to determine the degree of 'cooperation' between state and local officials and the actor...." 190 F.3d at 707. In its brief, petitioner criticized the lack of a functional analysis on the part of the court of appeals. See Brief of Petitioner at 44-46 & n.44; 34-36 & n.36. Respondents now apparently concede that a functional analysis is appropriate in determining state action. Brief of Respondents at 22 ("[T]he determination of whether an organization controlled by public employees acts under color of state law is based on a functional analysis"); 24 (the "function served" by an individual "determines whether he is acting under color of state law"). *See West v. Atkins*, 487 U.S. 42, 55-56 (1988)("It is the ... function within the system, not the precise terms of ... employment" that determines whether conduct "can fairly be attributed to the State"). *Cf. Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 267-69 (1991)(constitutional status turns on functional realities); *Santa Fe Indep. Sch. Dist. v. Doe*, 2000 U.S. LEXIS 4154, at *26 ("realities of the situation" control constitutional analysis).

4. Respondents contend that "[t]he absence of the feature of exclusivity is fatal to the public function theory of state action." Brief of Respondents at 17. *Amici* Interscholastic Associations likewise focus on this state action theory. Brief of Interscholastic Associations at 12-15. Both in its Petition for Writ of Certiorari and in its brief, petitioner has eschewed reliance on the "public function" theory of state action. CP 29 n.18; Brief of Petitioner at 45 n.43. No showing of exclusivity is required under the applicable theories. *Compare Georgia v. McCollum*, 505 U.S. 42, 51-53 (1992), and *Edmonson v. Leesville Concrete*

Co., Inc., 500 U.S. 614, 621-28 (1991) *with id.* at 639-40 (O'Connor, J., dissenting).

5. The constitutional significance of extracurricular activities as an integral part of the educational process – and particularly high school football – can no longer be doubted. *See Santa Fe Indep. Sch. Dist. v. Doe*, 2000 U.S. LEXIS 4154, at *37-38; *Board of Regents v. Southworth*, 120 S. Ct. 1346, 1356-57 (2000). In *Santa Fe*, 2000 U.S. LEXIS 4154, at *38, this Court recognized that "[h]igh school home football games are traditional gatherings of a school community; they bring together students and faculty as well as friends and family from years present and past to root for a common cause." The "traditional indicia of school sporting events ... generally include not just the team, but also cheerleaders and band members dressed in uniforms sporting the school name and mascot." At these games, the "school's name is likely written in large print across the field and on banners and flags." Further, "[t]he crowd will certainly include many who display the school colors and insignia on their school T-shirts, jackets, or hats and who may also be waving signs displaying the school name." *Id.* at *31. In sum, interscholastic athletic contests "take place on government property at government-sponsored school-related events." *Id.* at *21-22. They are identified with, inextricably intertwined with, and cannot be separated from the school's overall educational program.[4] Whether

[4] See Brief of Chester E. Finn, Jr. and Daniel Casse, CP 10-11-E ("Extracurricular activities in general and sports in particular can serve as pathways to opportunity for children from disadvantaged backgrounds.... [E]xtracurricular activities constitute an integral component of an overall education for most youngsters.... Students learn in different ways, but one essential ingredient is motivation..... [E]xtracurricular activities such as athletics are important as a way of motivating young people....

participation by schools in interscholastic athletic contests is voluntary or whether participation by individual public school students is deemed fundamental is immaterial.[5]

6. School choice and access to quality education are core concerns underlying this litigation. See CP 11-14; Brief for Petitioner at 24-26; Brief of Chester E. Finn, Jr. and Daniel Casse, CP 9-12-E. As the district court found, the state has an appropriate interest in preventing coercion or fraud but not in eliminating the flow of information that could inform school choice for students and their parents. CP 45-46-B. The liberty interest of parents in the "care, custody, and control of their children," first established in *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), and *Pierce v.*

Athletics can provide ... exposure to ideas and the motivation to learn. They, like art, drama, and journalism, can serve as the hook to get the attention of students and rivet it on the core curricular mission of the schools").

[5] Extracurricular activity is also important in a university's educational setting. In *Southworth*, this Court recently noted a university's strong interest in supporting students' speech in "their extracurricular campus life." 120 S. Ct. at 1356. If, however, a university supports that extracurricular speech by the imposition of mandatory activity fees, the university must "provide ... protection to its students' First Amendment interests" by respecting the principle of viewpoint neutrality. *Id.* A student referendum that substitutes "majority determinations for viewpoint neutrality" does not pass constitutional muster. *Id.* at 1357.

In this case, Tennessee's public schools have authorized TSSAA to regulate the speech of its members, including petitioner. Under *Southworth*, strong first amendment interests are at stake when TSSAA, as the agent for all the public schools in the state that field interscholastic athletic teams, suppresses the speech of one of its minority (*i.e.*, private school) members. That interscholastic athletics constitute an extracurricular component of the educational program of the high school members of TSSAA does not denigrate the significance of the state's role or the significance of the first amendment interests at stake.

Society of Sisters, 268 U.S. 510, 534-35 (1925), has recently been reaffirmed by this Court. *See Troxel v. Granville*, 2000 U.S. LEXIS 3767, at *18; *id.* at *40-42 (Thomas, J., concurring); *id.* at *67 (Kennedy, J., dissenting).

This reaffirmation makes clear the stakes for parents in having access to information regarding educational opportunity for their children. Access to information about alternative educational opportunities is the key underlying first amendment issue in this case. The Recruiting Rule adopted and enforced by TSSAA as agent for all public schools in Tennessee that play interscholastic athletics is a barrier to information on educational opportunity – a barrier that clearly would be subject to constitutional scrutiny if adopted by any single public school to determine which schools it would compete against in interscholastic athletics.

TSSAA's position is that, by acting collectively and organizing themselves into a nominally private corporate form, the public schools that control TSSAA can avoid constitutional scrutiny of their inhibitions on speech. *But see Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 397 (1995)("It surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form").

Petitioner contends that TSSAA's regulatory conduct is subject to constitutional scrutiny. TSSAA's rules and regulations govern the conduct of interscholastic competition among all Tennessee's public schools and among all private schools that wish to play competitively against a public school team.[6] TSSAA's regulatory conduct is controlled by

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[6] Only through membership in TSSAA is any private school assured of the ability to compete in interscholastic athletics against any public school in Tennessee. Compare Article III, Section 1(a) of TSSAA's by-

public schools and public school officials acting in their official capacity. TSSAA's rules and regulations govern access to an important public resource – the ability of any school to play interscholastic athletics with all of Tennessee's public schools. TSSAA is the regulator of interscholastic athletics as the agent of Tennessee's public schools,[7] and TSSAA's regulatory conduct is fairly attributable to the state as the "State [or local government] cannot avoid its constitutional responsibilities by delegating a public function to private parties." *Georgia v. McCollum*, 505 U.S. 42, 53 (1992).

II. The Source of Authority Issue

Under this Court's state action cases, an alleged constitutional deprivation must be "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible." In addition, "the party charged with the deprivation must be a person who may fairly be said to be a

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laws, which blanketly authorizes play with TSSAA members, with Section 1(e), which requires game-by-game written approval of TSSAA's Executive Director for games between TSSAA members and non-members. Under Section 1(e), the Executive Director has virtually unconstrained discretion to approve or disapprove individual games between TSSAA members and non-member private schools. Certain TSSAA rules and regulations must specifically be complied with in order for a non-member private school to be eligible for approval under Section 1(e). JA-126-27

[7] As TSSAA members, public schools delegate regulatory authority to TSSAA and are subject to TSSAA rules. Thus, under Article II, Section 29 of TSSAA's by-laws, TSSAA's eligibility rules are binding on TSSAA members and "shall not be set aside by mutual agreement for any contests whatsoever nor shall they be supplemented in any contest held under the jurisdiction of this Association." JA-122-23.

state actor." *American Mfrs. Mut. Ins. Co. v. Sullivan*, 119 S. Ct. 977, 985 (1999)(quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982)).

Respondents contend that the first prong of this analysis is not satisfied because "[t]here is no state law or rule of conduct giving TSSAA the power to enforce its rules against a private member school like Brentwood Academy." According to respondents, TSSAA's power flows from the "contract between TSSAA and Brentwood Academy" not from "any authority of state law." Since Brentwood Academy "voluntarily elects to join TSSAA," respondents contend that "TSSAA did not act under color of state law when it enforced its recruiting rule against Brentwood Academy." Brief of Respondents at 15.

Respondents' contention in this regard is flawed for four reasons.

A. The Voluntariness Issue

Respondents contend that petitioner's ostensibly voluntary participation in TSSAA means that TSSAA's enforcement of its rules against petitioner cannot have its source in state law. This contention cuts with much too broad a swath and is inconsistent with this Court's cases.

Private parties seeking licensure from the state are not compelled by state law to pursue their calling. They voluntarily seek approval from the state to pursue their business or their profession. The state's regulatory conduct has its source in state law and is subject to constitutional scrutiny despite the voluntary nature of the private party's application. *See, e.g., Bates v. State Bar*, 433 U.S. 350 (1977).

Similarly, a private party applying for public services or benefits is acting voluntarily in subjecting itself to the

authority of government. Yet, this Court's cases apply constitutional standards to state or local government administration of access to public services or benefits programs. *See, e.g., Goss v. Lopez*, 419 U.S. 565 (1975)(applying due process to student discipline in public school); *Goldberg v. Kelly*, 397 U.S. 254 (1970)(applying due process to deprivation of welfare benefits).

And constitutional standards apply to government in its role as employer or private contractor, even though there is no compulsion for any person to enter into an employment relationship or a contractual relationship with government. *See, e.g., Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985)(applying due process to local public school employee); *Branti v. Finkel*, 445 U.S. 507 (1980)(restricting political patronage dismissals in a public defender office); *Board of County Comm'rs v. Umbehr*, 518 U.S. 668 (1996)(extending first amendment protection to trash hauler serving as independent contractor to government); *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712 (1996)(applying patronage cases to independent contractors).

In sum, the purported voluntariness of petitioner's membership in TSSAA and the ostensibly contractual relationship between petitioner and TSSAA do not immunize from constitutional scrutiny conduct that is fairly attributable to the government. The first prong of *Lugar* is satisfied if an alleged constitutional deprivation is "caused by the exercise of some right or privilege created by the State" or "by a person for whom the State is responsible." 457 U.S. at 937.

In this case, TSSAA is largely composed of and effectively controlled by public schools and public school officials acting in their official capacity "for whom the State is responsible." Further, local public school officials have delegated regulatory authority to TSSAA to allocate a scarce public resource – controlling access to playing

interscholastic athletics with all the public schools in the state by determining what schools the public schools of Tennessee may compete against in interscholastic athletics and under what groundrules. Within the first prong of *Lugar*, that is the "exercise of a right or privilege created by the State" – *i.e.*, created by the conduct of every public school in the state that fields an interscholastic athletic team.

B. The Regulatory Conduct of TSSAA Is Controlled By Local Public Schools and Public School Officials Acting Ex Officio and As Such Is a "Rule of Conduct Imposed by the State" Under *Lugar*

Action by local public entities such as public schools and by local public officials such as public school principals is state action. *See, e.g., Goss v. Lopez*, 419 U.S. 565 (1975)(applying due process to student discipline in public school). The existence or non-existence of state legislation authorizing TSSAA to serve as the agency responsible for regulating interscholastic athletics is not determinative of the state action issue. A "rule of conduct imposed by the State" under *Lugar* can be imposed by local government actors as well as by the legislature itself.

Thus, respondents' contention – itself subject to challenge – that "[t]here is no evidence that the state of Tennessee has ever regulated interscholastic athletic competition" is simply not by itself a reason for holding that TSSAA does not act under color of law. Brief of Respondents at 17. Clearly, interscholastic athletics in Tennessee are regulated by TSSAA. If, as petitioner contends and *Tarkanian* states, the regulatory conduct of TSSAA is fairly attributable to the parties that control it, then TSSAA acts under color of state law and TSSAA's "rule[s]

of conduct" are "imposed by the State" within the meaning of *Lugar*.

C. SBE's 24-Year Designation of TSSAA to Regulate Interscholastic Athletics and the Ongoing Effect of SBE's Continued Recognition of TSSAA's Regulatory Role Mean that TSSAA's Regulatory Conduct Constitutes "the Exercise of Some Right or Privilege Created by the State" Under *Lugar*

In addition to the local-level government conduct that characterizes TSSAA's regulatory activity, there is also state-level government conduct as well. Respondents assert that "[t]he State of Tennessee has never regulated interscholastic athletic competition." Brief of Respondents at 16. Of course, respondents acknowledge, as they must, that for 24 years the SBE designated TSSAA as "the organization to supervise and regulate the athletic activities in which the public junior and senior high schools of Tennessee participate on an interscholastic basis." CP 23-B. As the district court found, and despite TSSAA's "bold statements to the contrary" (which are repeated in this Court),[8] the SBE has "reviewed and approved rules and regulations of the TSSAA since at least 1972." CP 24-B. Since 1996, SBE has no longer "'designate[d]' TSSAA as the official organization for supervision and regulation of secondary school athletics."

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[8] Respondents assert that "TSSAA never sought State Board of Education approval of its rules or by-laws." Brief of Respondents at 16. TSSAA apparently taxed the patience of the district court on this point: "It is disingenuous, at best, for Defendants to repeatedly state in their briefs ... that the State has never reviewed or approved TSSAA rules. Such an assertion is utterly false, as demonstrated by the minutes of the State Board of Education." CP 26-B; *see also* JA-157-69.

Now it "recognizes... the role of [TSSAA] in coordinating interscholastic athletic competition." CP 26-B. Still, SBE "clearly singles out the TSSAA by name to serve this function," and, "[m]ore importantly, the conduct of the parties has not materially changed." *Id.*

When viewed from the local-level perspective, TSSAA's regulatory conduct satisfies the *Lugar* state action requirement because local public schools and their officials control the organization's regulatory function and because the organization sets the groundrules for any school that wishes to compete in interscholastic athletics against any public school in Tennessee that fields an interscholastic athletics team. All public schools have joined TSSAA, and TSSAA serves as gatekeeper for any non-public school seeking to play interscholastic athletics with any public school. TSSAA is the regulator, not the regulatee,[9] serving as agent for local public schools, and performing a regulatory function on their behalf. From this local-level perspective, TSSAA's regulatory conduct is a "rule of conduct imposed by the State or by a person for whom the State is responsible." *Lugar*, 457 U.S. at 937.

From the state-level perspective, moreover, TSSAA exercises a "right or privilege created by the State." *Id.* The SBE has conferred authority on TSSAA to regulate interscholastic athletics for the state's public high schools. No change in function or relationships has taken place since

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[9] This distinguishes cases in which the issue was whether different degrees of state regulation or oversight were sufficient to turn the conduct of a private regulatee into state action. *See, e.g., Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). TSSAA exercises regulatory authority on behalf of the government (local-level and state-level). Its state action status stems from that function and its relationships with government at the local and state levels. Its state action status does not depend on its role as a regulatee.

SBE switched from designating TSSAA to recognizing TSSAA's regulatory role. *Cf.* note 3, *supra*. As a result of SBE's action, TSSAA controls access to interscholastic athletic competition with all public schools in Tennessee that field interscholastic athletic teams. SBE's 24-year designation of TSSAA to perform this regulatory function for all the state's public high schools has an ongoing effect. As a consequence, TSSAA's regulatory authority and conduct reflect the exercise of a "right or privilege created by the State."

D. SBE's Designation of TSSAA to Regulate Interscholastic Athletics As Its Agent Constitutes a "Right or Privilege Created By the State" Under *Lugar* Whether Or Not SBE Acted With Legislative Authorization

Respondents continue to contend that SBE's designation of TSSAA to serve as SBE's agent for the regulation of interscholastic athletics was without legislative authorization. Brief of Respondents at 16. This position is without foundation, see Brief of United States at 3-4, 20-21. But even if respondents were correct about Tennessee law in this regard, that would not alter the analysis.

Section 1983 applies to conduct "under color of any ... custom, or usage" as well as to conduct "under color of any statute, ordinance, [or] regulation ... of any State." Well-settled practices of state officials constitute a "custom or usage" with the force of law under §1983, even if "not authorized by written law." *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 167-68 (1970). "[A]uthority ... for this truism," *id.* at 168, was found in a 1940 Tennessee case, *Nashville, C. & St. L. R. Co. v. Browning*, 310 U.S. 362 (1940). In *Browning*, "the 'law' in Tennessee as established

by longstanding practice of state officials was that railroads and public utilities were taxed at full cash value." 398 U.S. at 168. That a statutory provision provided otherwise was not determinative. 310 U.S. at 369.[10]

In the present context, it is indisputably true that SBE formally delegated to TSSAA its authority to regulate interscholastic athletics for Tennessee's public schools. CP 23-B. As a functional matter, the ongoing effect of that delegation persists. For purposes of §1983, that constitutes a "custom or usage" under state law and means that TSSAA's regulatory conduct constitutes the "exercise of some right or privilege created by the State" under the first prong of *Lugar*.

III. Under *Tarkanian*, TSSAA's Regulatory Conduct Is Fairly Attributed to the State Because TSSAA Is Controlled By Public Schools and Public School Officials

The regulatory conduct of TSSAA is controlled by state actors – public schools and public school officials. Under *NCAA v. Tarkanian*, 488 U.S. 179, 193 (1988), that control by state actors of a regulatory function is attributable to the state.

In *Tarkanian*, the "source of the legislation adopted by the NCAA" was critical in determining the state-action status of NCAA. Because of NCAA's national character, NCAA's "source" of authority was "not Nevada but the

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[10] As Justice Frankfurter noted, "[i]t would be a narrow conception of jurisprudence to confine the notion of 'laws' to what is found written on the statute books, and to disregard the gloss which life has written upon it. Settled practice ... can establish what is state law.... Deeply embedded traditional ways of carrying out state policy ... are often tougher and truer law than the dead words of the written text." 310 U.S. at 369.

collective membership," and that membership spoke "through an organization that is independent of any particular state." *Id.*

The nature of NCAA's "collective membership" was critical because that "collective membership" was the "source" of NCAA's authority. While public institutions in Nevada "had some impact on the NCAA's policy determinations," the "vast majority" of NCAA's members, which "each similarly affected" NCAA's policies, were "located in States other than Nevada" and "did not act under color of Nevada law." *Id.* That is, those non-Nevada institutions controlled the NCAA's decisionmaking. The NCAA's state-action status was therefore determined by the composition and characteristics of the membership that controlled its decisionmaking processes. Since control of NCAA was by institutions from outside of Nevada, the "source" of NCAA's authority was not Nevada, and NCAA's conduct was not fairly attributable to Nevada.

Footnote 13, which has been discussed so much, made this point inexorably clear. "The situation would, of course, be different," this Court noted, "if the membership consisted entirely of institutions located within the same State, many of them public institutions created by the same sovereign." *Id.* at n.13. The key was control. For state-action purposes, the nature of a regulatory organization depends on the nature of the institutions that control it. If the membership of a regulatory body consists of "public institutions created by the same sovereign" and are all "located within the same State," then the control of the organization rests with state actors from within a single state. Under those circumstances, such as that involved in a high school athletic association like TSSAA, the conduct of the regulatory body constitutes state action.

Therefore, *Tarkanian* stands for the proposition that the "source" of the regulatory policies of an organization such as TSSAA is traceable to the "collective membership" that controls the organization. Public schools and their principals comprise 84% of TSSAA's membership and control its decisionmaking. The regulatory conduct of TSSAA is traceable to those public schools that control it and is therefore attributable to the state.

Since, under *Tarkanian*, control is the essential dimension that determines the character of a regulatory institution, how that control is exercised is irrelevant. Whether TSSAA's elected officials are representatives of public or private schools is not the question; TSSAA's state-action status turns on the control of TSSAA's regulatory functions by public schools and their principals. *See Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 399 (1995)(stressing importance of government "control... as a policymaker" in establishing Amtrak's "state"-action status); *Cf. Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252, 269 (1991)(effective control by Congress of airport authority raised separation of powers problem); *Bowsher v. Synar*, 478 U.S. 714, 730 (1986)(stressing importance of Congressional control over dismissal of Comptroller General and rejecting relevance of likelihood that Congress would actually remove the Comptroller General).

The critical role of control by state actors in determining the state-action status of TSSAA's regulatory conduct also explains why *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.* [*USOC*], 483 U.S. 522 (1987), is distinguishable from this case. *USOC* involved the question whether the conduct of USOC in refusing to allow use of the word "Olympic" in association with the Gay Olympic Games was attributable to the federal government.

The federal government chartered USOC and granted USOC the right to prohibit certain commercial and promotional uses of the word "Olympic" and various Olympic symbols. *Id.* at 526. This Court held that USOC's conduct was not attributable to the federal government. "The fact that Congress granted it a corporate charter does not render the USOC a Government agent." *Id.* at 543.

USOC was not a government agent because there was no evidence that the federal government had any involvement with USOC's decision regarding the Gay Olympics matter, and the government did not control USOC. Unlike TSSAA, USOC is a private organization controlled by private parties, not public institutions or government employees. This Court was unwilling to "equate" the government's "power of persuasion," which was present with respect to USOC, "with control," which was not. *Id.* at 545 n.27. In short, *USOC* reinforces the analytical centrality of control by state actors under principles established in *Tarkanian* and applicable to this case.

Conclusion

TSSAA exercises important governmental functions as the agent of both state-level and local-level governmental entities. It allocates access to an important government resource, establishing and administering the groundrules governing interscholastic athletics for all public high schools in Tennessee that participate in interscholastic athletics. Any private school wishing to participate in interscholastic athletics with a public school is subject to the approval of the TSSAA or its Executive Director and to applicable TSSAA rules and policies.

From the state-level perspective, the State Board of Education has designated TSSAA as its agent to regulate

interscholastic athletics throughout the state, and the effect of that designation is ongoing even though SBE now only recognizes TSSAA's role as the regulator of interscholastic athletics. From the local-level perspective, TSSAA is composed of 84% public schools, which control TSSAA's regulatory program. All public schools in Tennessee that field interscholastic athletic teams are members of TSSAA, delegating to that organization the authority to establish and enforce regulations regarding interscholastic athletics.

As all appellate courts that have addressed the issue other than the Sixth Circuit have held, the regulatory conduct of TSSAA constitutes state action and is subject to constitutional constraints. The decision of the court of appeals should be reversed.

Respectfully submitted,

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